IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :18.01.2006

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THE HONOURABLE MR.JUSTICE P. SATHASIVAM

AND

THE HONOURABLE MR.JUSTICE N. PAUL VASANTHAKUMAR

Criminal Appeal No.938 of 2003

Vellingiri .. Appellant

vs.

State by Inspector of Police
Mettupalayam Police Station
Coimbatore District
(Crime No.46/2002) .. Respondent

This criminal appeal is preferred under Sec.374 of the Code of Criminal Procedure against the conviction and sentence passed by the learned Additional District Sessions Judge cum Chief Judicial Magistrate, Coimbatore District in S.C.No.459 of 2002 dated 23.04.2003.

For Appellant : Mr. V.K. Muthusamy, Sr. Counsel
For Mr. M.A.P. Thangavel

For Respondent : Mr. V.M.R. Rajendran
Additional Public Prosecutor

..

JUDGMENT

(Judgment of the Court was delivered by P. SATHASIVAM,J.)

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The first accused (A.1) in Sessions Case No.459 of 2002 on the file of First Additional Sessions Judge cum Chief Judicial Magistrate, Coimbatore, aggrieved by the conviction and sentence of life imprisonment under Section 302 IPC and also fine of Rs.1,000/-, in default to undergo rigorous imprisonment for one year, has filed the above appeal. He was also convicted and sentenced to undergo rigorous imprisonment for six

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months under Section 324 IPC and also to pay a fine of Rs.500/-, in default to undergo simple imprisonment for one month.

2. The case of the prosecution is briefly stated hereunder:

(a) About 10 days prior to the occurrence, PW.1, PW.2 and one Karthick, after visiting Mettupalayam, were returning home, near Subham Theatre around 8.30 p.m., when Velliangiri (A1), Sivakumar (A3), Nagaraj (A2), Sampath (A4) came from opposite side, by inadvertence, PW.2 grazed A.1; infuriated A.1 and others, threatened them with dire consequences. Thereafter, PWs.1 and 2 along with Karthick returned home.

(b) On 22.01.2002, at about 11 p.m. while PW.1 was watching T.V., he heard a noise from PW.2's house and he saw that the accused quarrelling with PW.2 and he (PW.1) requested them not to quarrel during night hours. At that time, A.1, stabbed with knife on the back of PW.1, by saying why you are supporting PW.2. A.1 stabbed PW.2, above his left eyebrow and also stabbed deceased on his flank and left hand palm. PW.3 Shanmugam, PW.5 Balan, PW.4 Krishnan and others witnessed the occurrence.

(c) Immediately, PW.3 took the deceased and others to the Government Hospital, Mettupalayam. PW.12 Dr. Devasena, admitted PW.1 and 2 as well as deceased, and treated them. Then PW.2 and deceased were referred to Government Hospital, Coimbatore by PW.12. On information, PW.13 Mahalingam, Sub-Inspector of Police, went to Government Hospital and recorded the statements of PW.1, PW.2 and also the deceased.

(d) On the basis of complaint given by PW.1, a case was registered under Sections 324 and 506 (II) IPC in Crime No.46 of 2002 on the file of Mettupalayam Police Station. Then he prepared observation mahazar Ex.P3 and arrested the accused on 23.01.2002 in the presence of PW.9 Rangaraj and recovered MO.1 knife under Ex.P.19.

(e) On 04.02.2002, at 10.30 p.m. the deceased died at Government Hospital, Coimbatore. Then the case was altered into one under Section 302 IPC. On 05.05.2002, PW.14 G.P. Arumugam, Inspector of Police conducted the inquest and PW.10 Dr. Menakasekar, conducted post mortem and issued post mortem certificate, Ex.P.8. PW.14, Investigating Officer, after examining all the witnesses, filed a charge sheet on 27.06.2002, against the accused.

3. When the accused were questioned under Section 313 Cr.P.C. with reference to the incriminating circumstances found against them, in the evidence of prosecution witnesses, they denied the same. Accused have not examined any witnesses on their side.

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4. The trial Court after considering the evidence available on record, found the first accused guilty of the offence under Sections 302 IPC and convicted and sentenced him to undergo life imprisonment and to pay fine of Rs.1,000/-, in default to undergo rigorous imprisonment for one year. He was also convicted under Section 324 IPC and sentenced to undergo rigorous imprisonment for six months and to pay fine of Rs.500/-, in default to undergo simple imprisonment for one month. A.2 to A.4 were found not guilty of the charges framed against them and they were acquitted. Hence, the present appeal by A.1.

5. Heard Mr. V.K. Muthusamy, learned senior counsel for the appellant and Mr. V.M.R. Rajendran, learned Additional Public Prosecutor for the State.

6. Mr. V.K. Muthusamy, learned senior counsel for the appellant after taking us through the entire evidence, made the following submissions.

(i) Inasmuch as the alleged motive is flimsy, the trial Court ought not to have accepted the case of prosecution and convicted A1. In other words, according to him, absolutely there is no pre-plan and it is highly unbelievable that A.1 had intention to kill the deceased for a trivial incident that had taken place 10 days ago; and

(ii) Inasmuch as the deceased died after a period of 12 days from the date of occurrence, i.e., on 04.02.2002, that too after development of further complications, in the absence of examination of the doctor who treated him, the trial judge committed an error in convicting him under Section 302 and awarding life sentence.

On all the aspects, we have heard the learned Additional Public Prosecutor.

7. Regarding motive part, even in Ex.P1 – complaint and in the evidence of PWs.1 and 2, it is seen that while PWs.1 and 2 and another Karthick returning home, PW.2 grazed A.1, which infuriated A.1 and others and threatened them. Even according to PWs.1 and 2, the said incident had occurred 10 days prior to the occurrence. Though it is the case of the prosecution that, even after the incident both parties had some wordy quarrel, the same has not been substantiated. As a matter of fact, PWs.1 and 2 in their cross examination have admitted in categorical terms that except the said incident that took place 10 days prior to murder, no other incident had taken place. They said in categorical terms that, "சம்பவத்திற்கு 10 நாட்களுக்கு முன்பாக ஒருவருக்கொருவர் இடித்துக் கொண்டதால் ஏற்பட்ட தகராறு தவிர எ களுக்குள் ஏதுமில்லை. " As a matter of fact, PW.2 had gone one step further and stated that though he met the accused after the said incident, they had not

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threatened him at any time. Though we are conscious that motive alone is not the relevant factor, it cannot be denied that the motive alleged for the occurrence on 22.01.2002 by the prosecution is flimsy and trivial in nature and it requires further corroborating evidence.

8. Now, let us consider the medical evidence, nature of injuries sustained, etc. We have already stated that though the incident had occurred on 22.01.2002 at 10.00 p.m., the deceased died in the Government Hospital, Coimbatore only on 04.02.2002. The post mortem was conducted by PW.10 on 05.02.2002. Post mortem certificate has been marked as Ex.P.8. The following ante mortem injuries were found on the deceased.

> "1) Partly healed vertical sutured wound measuring 4 cms length seen over poster lateral aspect of lower one third of left arm. The middle of the wound is 10 cms above the left elbow. ON dissection the wound is muscle deep.
> 2) Sutured wound of 2 cms x 1 cm seen inner aspect of middle two third of left arm, 12 cms above left medical epichondial.
> 3) Vertically oblique healed sutured wound 3 cms x 0.5 cm seen in the left upper flank (Drainage wound).
> 4) Partly healed and partly infected transverse wound of 5 cms x 2 cms deep seen over left lower one third of the left chest antero-lateral aspect. The inner end is 12 cms away from the midline and 10 cms below and lateral to left nipple. On dissection the wound passes upwards, inwards and downwards cutting the underlying muscles nerves, vessels and pierced though the 6th intercostals space and ended in the left costal margin of diaphragm.
> 5) Partly healed sutured surgical wound of 20 cms length seen over the midline of the abdomen extending from epigastric region to just below the umbilicus. ON dissection left costal origin of diaphragm (Tear) sutured and cardiac and of stomach (perforation) also closed with surrounding area softening. "

The opinion of the post-mortem Doctor is,

> "The deceased would appear to have died of stab injury on the chest and its complications."

9. It is clear that injury Nos. 3 and 5 are surgical wounds. PW.10, the Doctor has stated that injury No.4 and the corresponding internal injury are sufficient to cause death. However, in the cross examination he deposed that,

> "4வது காயத்தில் ஏற்பட்டிருந்த சீழ்பிடித்த தன்மையானது, அந்த நபருக்கு முறையான சிகிச்சை அளிக்காததால் ஏற்பட்டிருக்கலாம் என்று என்னால் கூற இயலாது. 4வது வெளிக்காயம் நான் பரிசோதித்த போது அதில் பகுதியாக

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ஆறிவிட்ட காரணத்தினால் அது குத்துக் காயமா வெட்டுக் காயமா என என்னால் கூற இயலாது. காயம்பட்ட நபரை உடனடியாக பரிசோதித்த மருத்துவரால் அந்தக் காயம் எந்த ஆ,ய,தத்தால் ஏற்பட்டிருக்கலாம் என அறுதியிட்டு கூறமுடிய,ம். அந்த நபருக்கு 4வது காயத்தினால் ஏற்பட்ட பின்விளைவ,கள் என்ன என்று குறித்து அந்த நபருக்கு சிகிச்சையளித்த மருத்துவர் தான் கூற இயலும். "

It is clear from the statement of PW.10 and his post-mortem certificate Ex.P.8, the death was due to stab injury on the chest and its complications (emphasis supplied). Admittedly, the person who conducted surgery has not been examined. In other words, there is no information regarding type of treatment given to him from 22.01.2002 to 04.02.2002, when he was admitted in the Hospital and died respectively.

10. Though it is not in dispute that PWs.1 and 2, eye witnesses sustained injuries at the hands of A.1, as seen from the evidence of PW.12 and Exs.P.13 and P.14 – Accident Register copies, and the prosecution has established occurrence by way of injuries sustained by PWs.1 and 2 as explained by PW.12 and Exs.P.13 and P.14, in the absence of examination of Doctor who treated the deceased for nearly 12 days and conducted surgeries and in view of the categorical conclusion of the post-mortem doctor PW.10, in his certificate Ex.P.8 that the death was due to stab injury on the chest and its complications, we are satisfied that the accused / appellant is not liable to be convicted for the offence under Section 302 IPC.

11. In this regard, learned senior counsel for the appellant relied on a Division Bench decision of this Court in the case of Pauldas vs. State reported in 2005 M.L.J. (Crl.) 1, wherein in identical circumstances and in the absence of details regarding the nature of treatment given to the deceased, who was attacked on 01.02.1992 and died only on 11.02.1992, i.e., nearly after 10 days from the date of occurrence and in the absence of evidence as to nature of injuries, treatment given and the case sheet concerned, the Division Bench has concluded that, "we are of the view that the 2nd accused is not liable to be convicted for the offence under Section 302 IPC and at the most, he could be convicted for the offence under Section 304 Part II IPC." After saying so, the Division Bench, sentenced the said accused to undergo rigorous imprisonment for five years under Section 304 Part II IPC. On going through the factual details, we are of the view that the said decision is directly applicable to the case on hand and we also are in respectful agreement with the said conclusion.

12. In the case of Ramaswami vs. State of Tamil Nadu reported in 1982 (1) S.C.C. 474, after finding that the mortal wound stated to have been caused by single sickle blow on the head was not fatal and the victim, for a time, survived in the hospital and later, a surgery was done, but on account of infection, eventually he passed away 10 days later, their Lordships, particularly in the light of surrounding facts,

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have convicted the accused under Section 304 Part II IPC and not under Section 302 IPC and sentenced him to undergo 7 years rigorous imprisonment.

13. In the case of Ramasamy vs. State of Tamil Nadu reported in 1995 SCC (Cri.) 143, the Hon'ble Supreme Court, after finding that the accused inflicted only one injury on the abdomen of the deceased and the single injury hit in the ordinary course is sufficient to attract Clause Thirdly of Section 300 resulting in conviction under Section 302 IPC and after finding that the Doctor noticed only one injury in the abdomen and opined that the said injury was complicated due to post instances held that it is difficult to say that the accused had intention to cause that particular injury, but it is a case where Clause Thirdly of Section 300 is attracted and therefore, the offence committed would be a culpable homicide not amounting to murder. After saying so, the Court convicted him under Section 304 Part II IPC and sentenced him to suffer RI for 7 years.

14. In the light of our discussion and in view of the categorical statement of PW.10 and his opinion in Ex.P8, in the absence of examination of the Doctor, who treated the deceased / operated him, we are satisfied that at the most the appellant could be convicted for the offence under Section 304 Part II IPC. Considering his age and other family circumstances, and the fact that there was no clear intention or motive for A.1 to murder the deceased, we set aside the conviction and sentence under Section 302 of appellant/A1 and instead, he is convicted under Section 304 Part II IPC and sentenced to undergo rigorous imprisonment for 5 years. The fine amount if paid by A.1 as imposed by the trial Court for the offence under Section 302 IPC shall be refunded to him. The conviction and sentence under Section 324 IPC is confirmed. Both the sentences are to run concurrently.

Net result, the appeal is allowed in part.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

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To:
1. The First Additional Sessions Judge
   cum Chief Judicial Magistrate,
   Coimbatore.
2. The First Additional Sessions Judge
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   through the Principal Sessions Judge
   Coimbatore.
3. The Inspector of Police
   Mettupalayam Police Station
   Coimbatore District.
4. The Public Prosecutor, Madras.
5. The Superintendent, Central Prison,
   Coimbatore.
6. The District Collector, Coimbatore.
7. The Director General of Police
   Mylapore, Chennai 600 004.

+ 1 CC to Mr. P.Thangavel, Advocate SR NO 1756

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